IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 778

IN THE MATTER OF SAMUEL WINSHIP, APPELLANT

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX TO APPENDIX

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* The entire transcript of the March 30th hearing is included in the Appendix. Page references are for the convenience of the Court to indicate the pages of the transcript where testimony of the witnesses begins, and to designate rulings of particular significance.

APPENDIX

Sec. 731 F.C.A. Form 7-6 (Delinquency-Supervision)

FAMILY COURT OF THE STATE OF NEW YORK

CITY OF NEW YORK

COUNTY OF BRONX

Docket No. D-797/67

In the Matter of

SAMUEL WINSHIP

A Person Alleged to be a Juvenile Delinquent, *Respondent.*

Petition (Juvenile Delinquent)

TO THE FAMILY COURT:

The undersigned Petitioner respectfully shows that:

1. Petitioner, Rae Goldman, resides at 2436 Grand Concourse, Bronx, New York.

2. Petitioner is a person authorized to institute a proceeding under Article 7 of the Family Court Act by reason of the fact that (s)he is a person injured by the alleged activity of the respondent.

3. The Respondent above named is a male who was born on August 5th, 1954 and resides at 946 Bronx Park South, Bronx.

4. The following are the names and addresses of the parents or other persons legally responsible for the care of said Respondent or with whom said Respondent is domiciled:

Name	Residence	Relationship
Melvin Winship	946 Bronx Park So.	Father
Ethel (Coleman)	"	Mother

5. (Upon information and belief,) on or about March 28th, 1967 at about 6:15 P.M. at 2436 Grand Concourse, County of Bronx, City and State of New York said Respondent (set forth a concise statement of alleged delinquent acts)

did wilfully and unlawfully enter the locker room of the Normandie Furniture Store at the above location, and did remove from the petitioner's pocketbook $112 in lawful money of the United States, which he did steal and carry away.

6. The foregoing acts of said Respondent, if done by an adult, would constitute the crime or crimes of Larceny.

7. Said Respondent was over seven years and less than sixteen years of age at the time of the foregoing acts.

8. Said Respondent requires supervision, treatment or confinement.

9. As to the allegations herein made upon information and belief, the sources of Petitioner's information and grounds of belief are the statements and admissions of Respondent, if any, and the statements and depositions of witnesses, if any, now on file with this Court.

WHEREFORE, Petitioner prays that the Respondent be adjudged a juvenile delinquent and dealt with in accordance with the provisions of Article 7 of the Family Court Act.

Dated: March 30th, 1967

RAE GOLDMAN
Petitioner

VERIFICATION

STATE OF NEW YORK
COUNTY OF BRONX, SS.:

I, Rae Goldman, being duly sworn, say I am the Petitioner in the foregoing petition; said petition is true to my knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

RAE GOLDMAN
Petitioner

Sworn to before me, this
30th day of March, 1967.

CARL MELTZER
Clerk of the Court

LET (SUMMONS) (WARRANT) ISSUE

.....

J.F.C.

This is to certify that this is a true copy of Petition made in the matter designated in such copy and shown by the records of the Family Court of the State of New York, within the City of New York, for the County of Bronx.

RACHEL [Illegible]
Clerk of Court

(Seal)

Date Dec 8 1967

FAMILY COURT STATE OF NEW YORK CITY OF NEW YORK
JUVENILE TERM: BRONX COUNTY

PART I

In the matter of

SAMUEL WINSHIP, Respondent.

DOCKET NO: D 797/67.

BEFORE: HONORABLE MILLARD MIDONICK, Judge

DATE OF HEARING: March 30, 1967.

PRESENT:

Mrs. Rae Goldman, Petitioner.
Samuel Winshop, Respondent.
Mrs. Ethel Winship, Mother.
Mr. Melvin Coleman, Witness for Respondent.
Patrolman Clarke, Shield No. 4258, 46th Precinct.
Mr. John McShane, Reporting Probation Officer.
Mr. Larry Yorke, Youth House Representative.

APPEARANCE: IRENE ROSENBERG, ESQ., Attorney for Respondent, Legal Aid Society, 1109 Carroll Place, Bronx, New York.

[2] COURT OFFICER: Number 9, Samuel Winship, W-i-n-s-h-i-p. We have the police officer and the petitioner present. We have the boy and mother and petitioner and police officer are present.

THE COURT: Now, are you Mrs. Winship?

MRS. WINSHIP: Yes.

THE COURT: You are the mother of the boy here?

MRS. WINSHIP: Yes.

THE COURT: All right. Now, are you aware of the fact that you can have any lawyer that you can afford and that you can choose a private one or this public one or no lawyer at all, madam?

MRS. WINSHIP: Yes.

THE COURT: Which lawyer do you want?

MRS. WINSHIP: I will take the Legal Aid.

THE COURT: All right. Very good, Mrs. Rosenberg. How do you plead?

MRS. ROSENBERG: Not guilty, Your Honor.

THE COURT: Yes. Where is Mrs. Rae Goldman?

COURT OFFICER: Step up, please.

THE COURT: Well, is Lieutenant Sloan in- [3] terested in this case?

COURT OFFICER: He is not back yet.

THE COURT: Is there a policeman involved in this case?

POLICE OFFICER: No, not as a witness.

THE COURT: You saw nothing and you just arrested the boy on a complaint?

POLICE OFFICER: Not on this complaint.

THE COURT: Well, were you interviewed by Lieutenant Sloan? Does he want to try this case?

POLICE OFFICER: Yes. He's not here.

MR. YORKE: He had to go to a meeting.

THE COURT: I see. I cannot wait. I can't wait then. The petitioner is to be sworn in.

RAE GOLDMAN, the Petitioner herein, having been duly sworn by the Court, testified as follows:

EXAMINATION BY THE COURT:

Q. Give us your name. A. Rae Goldman.

[4] Q. Now, you live at 2436 Grand Concourse, Bronx? A. Yes. I am employed there.

Q. That is where you are employed? A. Yes.

Q. Where do you live? A. 1595 Union Port Road.

Q. What county is that? A. Bronx.

Q. And you are the lady who accuses this boy? A. Yes.

Q. Is that correct? A. Yes.

Q. Now, what happened, I take it, on March the 28th? That is two days ago. A. Yes, sir.

Q. At what time in the afternoon or evening did this happen? A. 6:15 in the evening.

Q. Where, madam? A. In the store.

Q. At 2436 Grand Concourse, Bronx? A. Yes.

Q. What is your capacity there? [5] A. Sales help.

Q. Yes. A. Sales person.

Q. What happened to you? Would you describe what happened to you? A. Well——

Q. And who did it. A. Well, one of the young ladies that I work with had came back from dinner and that she walked into the locker rooms and adjoining the locker room is a little bathroom. She said, "Who is in there"? I said, "No one". She said, "Yes, there is. The door is locked".

MRS. ROSENBERG: This is all hearsay.

THE COURT: Well, it depends.

MRS. GOLDMAN: We waited a minute to see who would come out of the bathroom.

MRS. ROSENBERG: Was she with the person?

THE COURT: Were you there?

MRS. GOLDMAN: Yes, I was there.

THE COURT: Yes. She was there.

MRS. GOLDMAN: Yes.

THE COURT: She was told the door was locked and that she waited for it to open.

[6] MRS GOLDMAN: Yes, that's right. The door had opened in a minute or two and out ran this boy.

EXAMINATION CONTINUED BY THE COURT:

Q. Samuel Winship, the boy standing here? A. Yes.

Q. What happened? A. Well, I ran to the locker to see if my bag was there and that I had some money in my locker and it was gone. I ran out of the store and they told me that they saw a youngster running around the block which I tried to run after him and capture him.

Q. Yes. A. I saw no one. I came back and the girls had found my bag in the——

Q. Wait a minute. Did you see your bag? A. No, I did not see my bag. It was gone.

Q. The trouble with the way you testified is that the girls had "found my bag" is something that someone else can testify about and not you. They told you so? A. Well, I

assumed that the boy had my bag. I assumed that he had my bag with my money. When I came back——

[7] MRS. ROSENBERG: Oh, Your Honor.

MRS. GOLDMAN: It was empty.

THE COURT: Well, the assumptions don't put little boys in jail. You have to know something.

MRS. GOLDMAN: This boy ran out of the bathroom and my bag was on the bathroom floor.

Q. Did you go in afterwards and find it there yourself? A. Yes.

Q. Your bag was in the bathroom that this boy had run out of? A. Yes, right.

Q. What condition was your bag in? A. Scattered. My cosmetic case was scattered and everything was scattered and my money wasn't there.

Q. How much money had been there when you left? A. Approximately $120.

Q. I see. A. $112. I am sorry.

Q. Do you remember what kind of bills? A. Well, I had a $50 bill, two twenties and the rest, I don't know.

Q. Now, how long after this boy ran out did you see [8] him next? A. Next, I saw him here.

Q. Yes. A. The next time I saw him was last night in the police station.

Q. Now, then, did you identify him among a group or just by himself? A. Just this little boy because I have seen him a number of times sneaking around and prowling around the store.

MRS. ROSENBERG: Objection.

MRS. GOLDMAN: And that very often I have threatened to call the policeman to get him out.

Q. What kind of a store is it? A. A furniture store.

Q. I see. A. He would hide behind the chairs.

MRS. ROSENBERG: Objection.

THE COURT: Well, the objection is overruled. I am hearing this, Mrs. Rosenberg, for the limited purpose and it happens to be the most important purpose in the case as far [9] as I can see up to now of how well this lady had known this boy's face and figure. Otherwise, her identification depends in good part about how well she knew him. She's now describing how well she knew him. The testimony is not going to be used against the boy who skulks about, but whether he has been seen before.

Q. How many times before? A. At least six times. In fact, he once shined my shoes in the store.

Q. I see. A. He always has a little shoe box with him.

Q. Did you know his name? A. No.

Q. No? A. No.

Q. How good or bad was the light when he ran out of that bathroom? A. It was still daylight.

Q. It was still daylight? A. Yes.

Q. Was the daylight shining into that place where you [10] saw him? A. Well——

Q. I don't know whether there were any windows or what. A. Well, I saw him run out of the place and out into the street and it was daylight.

Q. Do you mean you saw him as he went through the door? .A Right.

Q. Which is well lit? A. Yes, well lit.

Q. You gave chase, but did not catch him? A. Yes, that's right.

Q. Is that right? A. Yes.

Q. Your bag you have but not the $112? A. Yes.

Q. Is that right? A. Yes.

Q. Now, was there any other little boy in that bathroom? A. No, just this little boy.

Q. What does the bathroom say on the outside? Does [11] it say women or men or nothing? A. No, nothing. Just the door. We know it's for the employees only and we know it's the bathroom.

Q. Now, was there any other person that you—that wasn't a co-worker, there at the time that this little boy was in that bathroom? A. No.

Q. No customers? A. No. At 6:00 o'clock happens to be a very quiet time. It is dinner hour.

Q. Everyone else in the store were people that were your co-workers? A. Yes.

Q. Two girls? A. They know this boy very well, too.

MRS. ROSENBERG: Objection.

THE COURT: The objection is sustained. You must not tell us what someone else knows.

MRS. GOLDMAN: Yes.

THE COURT: What you know only is what you can swear to. You can't swear to anything else.

MRS. GOLDMAN: All right.

[12] THE COURT: You can swear that there were other people present when this boy was about the store from time to time and that you saw him shine their shoes. They're not here to testify.

MRS. GOLDMAN: I am unfamiliar with this, and I tried to answer as best as I can.

THE COURT: I understand. I am listening. Tell me one more thing if you can remember. What was the period of time, madam, between the time that you last saw your bag intact and you saw this boy rush out of that bathroom?

MRS. GOLDMAN: About 5:30 because I had come back from dinner that time and I put my bag in there.

Q. With the money in it? A. Yes.

Q. How far was the locker that you put your bag in from this bathroom? A. Two steps.

Q. Right alongside then? A. Yes.

Q. Was it locked or not locked? [13] It wasn't locked.

Q. And are there any other lockers for the other employees? A. Yes, there are three other lockers.

Q. You had your own private locker? A. Right.

Q. And does it make a noise when it's opened? A. No, not necessarily.

Q. Is it steel or wood? A. Steel.

Q. Is it in plain sight of where you were performing your chores between 5:30 and 6:00 o'clock? A. Yes.

Q. Was it at 6:00 o'clock that you saw this boy or 6:15? A. Was the locker in plain sight?

Q. Yes, of you. A. No, the lockers are behind a closed door.

Q. Is there any other access to your store except from the front? A. No, just the front.

Q. Did you see when this boy had come in that night? A. No.

[14] Q. Were you aware that he was in the premises before he came out of the bathroom? A. No.

Q. I see. A. Not at that particular time, no.

Q. So, then, for one half hour, approximately, that bag was out of your sight? A. Yes.

Q. It was a little more than a half hour? A. Well, I would say a little more than a half hour.

Q. About 5:30 to 6:15? A. Yes, this had happened at 6:15.

Q. Now, during that whole 45-minute period, do you recall any customers walking into the store and leaving your sight for the back? A. No. When a customer walks into the store we, as a rule, follow the customers because we try to give the customer attention.

Q. However, this boy seemed to have gotten into the store before 5:30 or after and you know not which? A. No.

Q. Is it because of his size that it is hard to follow him in your store with furniture? [15] A. Well, he knows his way around.

Q. He is a little one? A. Yes.

THE COURT: Let's estimate his size, shall we? How tall are you?

MRS. ROSENBERG: Five foot four and with heels, five-five.

THE COURT: I would say that he is a little under five feet, wouldn't you? Do you know your size, son?

RESPONDENT: No, sir.

MRS. ROSENBERG: About four-eleven.

MRS. WINSHIP: I am four-eleven and a half.

THE COURT: Would you stand beside him. What are you with heels, mother?

MRS. WINSHIP: Well, I'm four-eleven right now.

THE COURT: The boy is a full two inches shorter. He's about four feet nine. How old is the boy, Mrs. Rosenberg? Would you concede his age?

MRS. ROSENBERG: He is 12.

[16] THE COURT: All right.

MRS. ROSENBERG: Yes. He'll be 13 this August.

EXAMINATION CONTINUED

BY THE COURT:

Q. Now, have you gotten any money back that you lost? A. No.

Q. No? A. No.

Q. Is there any other witnesses here with you? A. No.

THE COURT: All right. This lady is here to defend the boy by State law and that she will ask you questions, too, and please answer what you can.

MRS. GOLDMAN: Yes.

EXAMINATION BY MRS. ROSENBERG:

Q. I didn't understand whether or not you were in the store during your supper hour or went out. A. No, I was in the store.

Q. You were in the store all the time? A. Yes.

Q. Was the entrance visible to you? [17] A. Yes.

Q. At all times? A. Yes.

Q. Did you say that you did not see this boy? A. I didn't see him come in, no.

Q. How long did you look at the person coming out of the bathroom? How many seconds did you get to look at the face? A. At this little boy?

Q. At the person who was in the bathroom. A. Well, I would say, no more than about ten seconds because, let's say, it's about 20 feet from the doorway that he ran quickly. Let's say about ten seconds.

Q. Did you get a look at his face? A. Yes. I saw the profile.

Q. His profile? A. Yes.

Q. Do you remember what the little boy was wearing? A. Yes. He was wearing this coat with the fur collar and his glasses and he wore a cap.

Q. You said a cap? A. A cap.

Q. Did you say that the locker in which you had put [18] your pocketbook, prior to having supper, was unlocked? A. Yes, it was unlocked.

Q. Yes. A. The door was closed but it was unlocked.

MRS. ROSENBERG: No further questions, Your Honor.

THE COURT: All right. Do you have any other witnesses at all?

MRS. GOLDMAN: No. I didn't think that I had to bring any witnesses.

THE COURT: All right.

MRS. ROSENBERG: I move to dismiss upon the ground for failure to establish a prima facie case.

THE COURT: Do you wish to have a witness of your own?

MRS. ROSENBERG: Yes.

THE COURT: All right. You may step down, please.

(Whereupon, the petitioner in this matter steps down from the witness stand.)

MRS. ROSENBERG: Thank you.

THE COURT: Who is your first witness?

[19] MRS. ROSENBERG: I call Mrs. Winship.

THE COURT: All right.

(Whereupon, the mother, Mrs. Winship, takes the witness stand.)

ETHEL WINSHIP, a witness herein, having been duly sworn by the Court, testified as follows:

EXAMINATION BY THE COURT:

Q. What is your full name? A. Ethel Winship, W-i-n-s-h-i-p.

Q. And your address? A. 946 Bronx Park South.

Q. I take it that you are the mother of Samuel here? A. Yes, I am.

THE COURT: Go ahead.

MRS. ROSENBERG: Yes.

EXAMINATION BY MRS. ROSENBERG:

Q. Now, Mrs. Winship, on the 28th, 1967, which was this past Tuesday—— A. Yes.

Q. Do you know where your son, Samuel, was? A. Yes, I do.

Q. He didn't go to school that day? A. No, no school.

[20] Q. Because of the Easter vacation? A. Yes.

Q. Would you describe to the Court what you did that day? A. Well, he got up and my son and daughter had breakfast. Then after having breakfast, I decided to take them to the zoo. We went to the zoo about 10:00 o'clock. We got back about an hour or two later. I went upstairs and Samuel had lunch. Then he took his sister bicycle riding. After that, I called him up to have dinner.

Q. About what time was that? A. He went down, let's see, about 3:00 or 4:00 o'clock is what I would say.

Q. When did they come back up to the house? A. Well, a little after 5:00.

Q. A little after 5:00? A. Yes.

Q. Yes. A. They came upstairs. They had dinner at 6:00 o'clock that night.

Q. At 6:00 o'clock? A. Yes.

Q. Did Samuel leave the house at any time after he [21] came up? A. No.

Q. From bicycle riding? A. No. Samuel stayed up that evening and watched television with his father.

Q. Who else was in the house besides you and your husband? A. My husband, my brother, my brother-in-law and myself and my daughter.

Q. Now, is there a back door to your apartment? A. No, it's not.

Q. Is there a fire escape? A. Yes, there is.

Q. Is it possible that Samuel could have slipped out through the fire escape? A. No, because I have a gate on my fire escape which is locked at all times and that is my bedroom.

Q. Your bedroom? A. Yes.

Q. Well, it's a gate that is locked and you have a key? A. Yes, I do.

Q. Now, is there any way that Samuel could have left [22] the house or slipped out of the door without you or someone else in the house seeing him? A. It's impossible.

Q. Impossible? A. Yes.

Q. What is your address? A. 946 Bronx Park South.

Q. Do you know, approximately, what distance your apartment is from 2436 Grand Concourse? A. No, I don't actually. I know it's quite a distance from home. From what I gather, it's on Fordham Road on the Concourse and in order for me to leave and that I would have to take a bus to get over to that side. In fact, I think I have to take the 20 bus, that is 2-0 bus that goes over there.

MRS. ROSENBERG: No further questions.

THE COURT: All right.

MRS. ROSENBERG: I have no further questions.

THE COURT: Well, do you wish for me to ask this mother any questions, Mrs. Goldman?

MRS. GOLDMAN: No, I don't.

THE COURT: All right. Thank you.

MRS. ROSENBERG: I have another witness.

THE COURT: Oh, yes. I would like to ask her something. [23] THE COURT: Oh, yes. I would like to ask her something.

EXAMINATION BY THE COURT:

Q. Has your son shown any signs of having any money in the last two days? A. No, no more than what I gave him myself.

Q. Which was what? A. Well, on the date that we went out to the zoo, I gave him $1.00 and I gave my daughter 50 cents to spend at the zoo and buy odds and ends, and they bought a little junk that they sell in the zoo.

Q. He should have only change with him? A. Yes.

Q. Have you checked to see what he has? A. Yes, definitely so. I make sure every time.

. I am talking about yesterday and today. A. Yester-
?
. Yes. A. Samuel only had about 20 cents is what I
e him.
. No money at all? Are you sure? A. Yes.
. He has no place in the house to hide it, that you know
[24] A. No.
HE COURT: Do you have any money with you son? Do.
want him to be searched?
RS. WINSHIP: He may be searched.
RS. ROSENBERG: Do you have any money with you?
At this time, the attorney is conversing with the re-
ident.)
. WINSHIP: He may be searched.
HE COURT: Well——
OURT OFFICERS He was upstairs and they automatically
ch him.
HE COURTS Was he in Youth House overnight?
OURT OFFICERS He was in detention, Judge. T[illegible]o-
cally searched him upstairs.
HE COURT: Were you searched upstairs, son?
ESPONDENT: Yes.
HE COURT: Is there any of your possessions upstairs at

RESPONDENT: My hat.
HE COURT: What kind of a hat? This boy has a right to
ain silent.
RS. ROSENBERG: I'll allow him to answer for this pur-
.
HE COURT: What kind of a hat?
ESPONDENT: A leather hat.
HE COURT: All right. That is what the lady has said he
wearing. All right, mother. Does this boy of yours ever
e shoes to make a little money?
RS. WINSHIP: Yes, I let him do it.
HE COURT: Well, he evidently had done it away from
house at this store because the testimony shows that,
know——
RS. WINSHIP: Well, I understood what she said.
HE COURT: Yes. He knows his way there.
RS. WINSHIP: Yes.

THE COURT: The question is, how long it takes him to get there. Do you know how long it takes you to get to her store?

MRS. WINSHIP: I don't know where her [25] store is.

THE COURT: It is 2436 Grand Concourse.

MRS. ROSENBERG: Is that near Fordham Road?

MRS. GOLDMAN: Yes. 188th Street on the Concourse.

MRS. ROSENBERG: Near what street is 946 Bronx Park South?

MRS. WINSHIP: I'm on Vice Avenue. On the corner of Vice Avenue and Bronx Park South. The nearest big street is 180th Street and, which is two blocks behind me.

MRS. ROSENBERG: That is about a half hour trip?

MRS. WINSHIP: In order to get over to where she——

THE COURT: Well, I don't understand how this lady had found your son unless she knew enough about him to describe him very carefully and where he lived, too. Do you know how your son was found?

MRS. WINSHIP: Well, the only thing that I can say is what I got from him last night [27] and that is all I know.

THE COURT: Do you know how they found your son?

MRS. WINSHIP: No. Actually speaking——

THE COURT: We'll find ou from Mrs. Goldman.

MRS. WINSHIP: Well, I don't know how she winds up that way.

THE COURT: Any other questions?

MRS. ROSENBERG: No. I have another witness.

THE COURT: Very good. Bring the next witness in.

MELVIN COLEMAN, a witness herein, having been duly sworn by the Court, testified as follows:

EXAMINATION BY THE COURT:

Q. What is your name, please? A. Melvin Coleman.

Q. What is your address, sir, and where do you live? A. Well, 946 Bronx Park South.

THE COURT: All right. Go ahead.

How old are you, son?

[28] THE WITNESS: I am 26.

THE COURT: You are 26?

THE WITNESSS Yes.

THE COURT: All right.

EXAMINATION BY MRS. ROSENBERG:

Q. Mr. Coleman, were you in the house at 946 Bronx Park South, in your sister's apartment on March the 28th, 1967? A. Yes.

Q. In the afternoon? A. Yes.

Q. Did you leave the house at all that day? A. No.

Q. You stayed in the house all day? A. Yes.

Q. Do you remember, approximately, what time you had dinner? A. Well, I think about 6:00.

Q. About 6:00? A. Yes.

Q. Was Samuel eating dinner with you? A. Yes.

Q. Do you know whether Samuel was in the house before [29] 6:00 o'clock? A. Yes.

Q. Do you know what time he came in? A. Well, no. I can't remember.

Q. Was it in the afternoon? A. Yes, it was in the afternoon.

THE COURT: You are this boy's uncle?

THE WITNESS: Yes.

THE COURT: What day of the week was this that you are talking about?

THE WITNESS: I don't remember what date it was.

THE COURT: You don't remember what date it was? What good is all this testimony.

MRS. ROSENBERG: March the 28th.

THE COURT: Well, you are telling him a number. I asked him what day of the week it is. If he didn't know what day of the week it is, you might as well not have him on the witness stand.

EXAMINATION CONTINUED

BY MRS. ROSENBERG:

Q. Do you know what day of the week that was? [30] A. I think it was a Wednesday.

THE COURT: Well, it wasn't, my dear sir. It was Tuesday and you don't know what date we're talking about and I don't think that your testimony is worth anything. It's as if he didn't testify at all.

MRS. ROSENBERG: Well, if I can ask him what date they went to the zoo, that might help to recall the date.

THE COURT: Well, I'm very worried about this man not

being able to identify the date that we're talking about because every other day of human existence has nothing to do with this case. You go ahead and try to identify it, but it seems to me that something is very strange.

EXAMINATION CONTINUED

BY MRS. ROSENBERG:

Q. Do you remember what day Samuel went to the zoo with his mother? A. Well, Tuesday.

Q. Tuesday? Was Samuel in the house— on Tuesday, March the 28th, do you remember what time Samuel had come [31] in after he had gone bicycle riding? A. I think it was about 3:30.

Q. Did Samuel have dinner with you? A. Yes.

Q. How long did the dinner last? A. Well, I don't know how long it lasts? I never time it.

Q. Did Samuel eat dinner in, every day this week? A. Yes.

THE COURT: Do you live in that house?

THE WITNESS: Yes, I stay there sometimes.

Q. Did you eat dinner at 946 Bronx Park South, in your sister's house, every day this week? A. Yes, every day this week.

Q. Every day this week? A. Yes.

Q. And every day, was Samuel eating dinner with you? A. Yes.

Q. And do you know, approximately, what time the dinner is served in your sister's house? A. Usually about 6:00.

Q. About 6:00? [32] A. Yes.

Q. Samuel ate dinner with you every single night this week? A. Yes.

remember the particular date. That is all the questions that

MRS. ROSENBERG: I think it is irrelevant that he may not I have of this witness.

THE COURT: Well, Mrs. Goldman, do you have any questions that you can think of to ask this gentleman?

MRS. GOLDMAN: No.

EXAMINATION BY THE COURTS

Q. Can you tell me, sir, whether your nephew, Samuel, has shown any signs of having money in the last two days? A. Well, except when he had money when he goes shining.

Q. Do you mean just a few cents? A. Yes.
Q. Not large bills like $50 bills or $20 bills? A. No.
Q. Does he usually ask you for money? A. Sometimes.
Q. Has he asked you for money in the last week? [33] A. Yes.
Q. Would you say which days he asked you for money? A. Sunday I gave him money to buy a kite. On Tuesday, Wednesday.
Q. Did he ask you yesterday for money? A. Yes.
Q. Did you give him any? A. I give him some change.
Q. He asked you yesterday? Are you sure now? A. Yes, I'm positive.

THE COURT: Well, all right. Any other questions?

MRS. GOLDMAN: No, sir.

THE COURT: All right. Thank you, Mr. Coleman.

MRS. ROSENBERG: Well, I want him to take the stand.

THE COURT: Come up here, son.

SAMUEL WINSHIP, the respondent herein, having been duly sworn by the Court, testified as follows:

EXAMINATION BY THE COURT:

[34] Q. What is your name, son? A. Samuel Winship.
Q. Now, you are 12 years old? A. Yes.

THE COURT: Go ahead.

MRS. ROSENBERG: Thank you.

EXAMINATION BY MRS. ROSENBERG:

Q. Now, Samuel, do you remember when March the 28th was? Was it on Tuesday? That is this Tuesday. Today is Thursday. A. Yes.
Q. Do you remember where you were on Tuesday? A. Yes.
Q. Did you go to school that day? A. No, sir. There was no school.
Q. What did you do that day? A. Me and my mother and sister went to the zoo.
Q. You have to speak up. A. From there, I went home and then——

THE COURT: Well, you are not speaking loudly enough for Mrs. Goldman to hear you. After the zoo, what?

RESPONDENT: Well, after the zoo, I asked [35] my mother if I can take my sister down again so that we can go bicycle riding.

THE COURT: Take her bicycle riding?
RESPONDENT: Yes.
THE COURT: What did your mother say?
RESPONDENT: Yes.
THE COURT: Did you?
RESPONDENT: Yes.
THE COURT: All right. Go ahead.
RESPONDENT: Well, I stood around the block. My mother called me up to come upstairs to get ready to eat.
Q. When? A. Well, what time?
Q. Was it light or dark outside? A. It was daytime.
Q. It was? A. Yes.
Q. How long was it before you ate dinner, once you came up into the house? A. Well, dinner was already served.
Q. Did you go out of the house at any time on Tuesday night after supper? [36] A. No.
Q. What did you do all evening? A. I sat down and looked at TV.
Q. Television? A. Yes.
Q. What time did you go to sleep? A. Well, I went to bed about quarter to 8:00.
Q. Quarter to 8:00? A. Yes.
MRS. ROSENBERG: All right. That is all the questions.
THE COURT: All right. Well, Mrs. Goldman, if you can think of anything to ask him you do and, while you are thinking, I'll ask him a few.

EXAMINATION BY THE COURT:

Q. Do you shine shoes in Mrs. Goldman's store from time to time? A. No. I have never shined her shoes before.
Q. Never shined her shoes at all? A. No.
Q. She said that she remembers you doing it. Do you think that she's wrong? [37] A. Yes, sir.
MRS. GOLDMAN: Have you ever been into the store?
RESPONDENT: No.
MRS. GOLDMAN: You don't know the store?
RESPONDENT: No.

EXAMINATION CONTINUED

BY THE COURT:

Q. You don't know the store at all? A. No.
Q. How do you suppose Mrs. Goldman knows that you wear a black leather hat and all of the that?

MRS. GOLDMAN: And the glasses.

Q. And the glasses, if you have never been there before?

MRS. GOLDMAN: A fur collar.

RESPONDENT: I have never been inside of the store.

Q. You don't know that bathroom that she is talking about? A. No.

Q. You don't know the locker that she is talking about? [38] A. No, I don't.

Q. Have you ever seen Mrs. Goldman before yesterday in the police station in your whole life? A. Well, that was my first time.

Q. The first time that you saw the lady? A. Yes.

Q. Do you know how she came to find you? A. No, sir.

Q. You do not. Do you have any money with you right now? A. No, sir.

Q. Can you turn your pockets inside out, please, so that we can all see? A. Yes.

(Whereupon, the respondent is turning his pockets inside out.)

THE COURT: You have only a comb and brush there. Also your coat. Is there anything in your coat? Will you have a look, Mr. Court Officer.

COURT OFFICER: Yes.

(Whereupon, the Court Officer is patting the coat.)

MR. YORKE: Youth House takes all property.

THE COURT: Does he have any property in Youth House?

MR. YORKE: I don't know.

MRS. ROSENBERG: Can you find out?

MR. YORKE: I don't know.

THE COURT: Would you do that.

MR. YORKE: I can find that out.

THE COURT: All right.

MR. YORKE: If he has that, it would be upstairs.

THE COURT: All right. We'll have a stipulation on your say-so, won't we? Now, then, I don't have anything more that I can ask this boy that I can think of at the moment, Mrs. Goldman. Do you wish for me to ask him anything else?

MRS. GOLDMAN: No, sir.

MRS. ROSENBERG: Can we recall Mrs. Goldman to the stand?

THE COURT: Yes, of course. Is this your last witness?

MRS. ROSENBERG: Yes.

[40] THE COURT: All right. Now, Mrs. Goldman, would you please come back here.

MRS. GOLDMAN: Yes.

(Whereupon, the petitioner was recalled to the witness stand.)

EXAMINATION BY THE COURT:

Q. The first thing that I want to know and I don't know if Mrs. Rosenberg would like to know. I want to know how you came to find him and trace him altogether. A. Well, when I found that my money was missing, I called the police station.

Q. Yes. A. I described the boy to the policeman. That is Patrolman Clarke, was one of the patrolmen there. Last night, I received a call at about 9:00 o'clock telling me that they had picked up a little boy and he answered to my description and would I come.

Q. Did you have any place to direct them to, as to name, address? A. Just his description.

Q. Or school? A. No.

Q. Just description? [41] A. Yes, and the fact that I had seen him several times.

Q. How did you describe him to the police? A. I described him as a little boy between 12 and 14 years of age. Under five feet five, round face, dark coloring and wearing glasses and I described his clothes.

Q. I see. A. Because, as I say or as I have said, I have seen him every so many times.

Q. On that basis, the police had found this little one out of eight million people scattered around the city? A. No, they found him behind a safe.

THE COURT: Well, wait a minute.

MRS. ROSENBER: Objection.

MRS. GOLDMAN: You asked me where.

THE COURT: Well, it's not received into evidence. We'll have to call the police as to how they found him.

MRS. GOLDMAN: All right.

THE COURT: All right. Are you through with this lady?

MRS. ROSENBERG: Is it possible that you could have made a mistake?

[42] MRS. GOLDMAN: No.

MRS. ROSENBER: No?

MRS. GOLDMAN: No. I know the scar on his face. I know that little boy. I couldn't miss him any place.

MRS. ROSENBERG: That is all.

THE COURT: All right. Thank you, ma'am. Police officer, please. You are the one who arrested this boy?

POLICE OFFICER: Yes.

THE COURT: Would you tell us how you found him?

PATROLMAN CLARKE, having been duly sworn by the Court, testified as follows:

EXAMINATION BY THE COURT:

Q. Now, please identify yourself? A. Patrolman Clarke, Shield Number 4258, 46th Precinct, Bronx.

THE COURT: Before I ask this gentleman questions, Mrs. Rosenberg, and since we have no police counsel and that he is not present in the courthouse today, I don't know what '[43] the officer is going to say and I am sure you don't.

MRS. ROSENBERG: No.

THE COURT: I don't know what is coming. We'll have to just play it by ear, won't we?

MRS. ROSENBERG: Yes, sir.

THE COURT: All right.

EXAMINATION CONTINUED

BY THE COURT:

Q. Now, officer, did you get a description from Mrs. Goldman about or asking you to find a boy who had taken her money? A. Well, Your Honor, the description was on our sheet in the precinct. The UF61 Report.

Q. That is in what precinct? A. In the 46th Precinct.

Q. Now, did that cover where this lady works at 2436 Grand Concourse? A. Yes. It includes the place that she works, her residence, her phone number and what happened and in this case it also included a description.

Q. Do you have it with you? A. I don't have it with me.

[44] Q. Do you remember the description from the sheet? A. Well, the description was that the child was under five feet and I remember glasses. I heard the leather cap and the fur collar. Now, this is all that I do recall from the description on the report.

Q. Does your precinct cover the boy's residence at 946 Bronx Park South? A. No, the 48th Precinct covers that.

Q. How far would you say is between 946 Bronx Park South and 2436 Grand Concourse? A. Well, a considerable distance, your Honor.

Q. Yes. A. About 15 minute bus ride or so.

Q. Now, did you, personally, search for this boy as a result of seeing this sheet in your precinct house? A. No. While on patrol on Fordham Road with the Sergeant in our patrol, we— somebody came up to us as we were stopped at a light on Fordham Road and had said that some boy——

MRS. ROSENBERG: Objection.

THE COURT: It has nothing to do with this case except——

THE WITNESS: No, nothing to do with this case. You asked me how did I find him.

[45] The Court: Yes, that is not prejudicial.

MRS. ROSENBERG: If you can ask the policeman——

THE COURT: Well, where did you find him?

MRS. ROSENBERG: Well, whether or not he found the boy because of the description given by the petitioner, Mrs. Goldman.

THE COURT: That is an opinion. We can make up our own minds as to whether the description fits. Where did you find the boy?

THE WITNESS: I found him in the rear of Zaro's Bakery on East Fordham Road.

Q. What do you mean by the "rear"? Was it inside or outside? A. No, inside of the premises in the back door. In the kitchen light.

MRS. ROSENBERG: Your Honor, I would like to stipulate now that he was found pursuant to another complaint that is not before the Court right now. It's going to come out.

THE COURT: He was trespassing some place or other?

MRS. ROSENBERG: Yes.

[46] EXAMINATION CONTINUED

BY THE COURT:

Q. When you saw this boy, did you have the knowledge of the sheet that somebody like him was wanted? A. No, I had no idea.

Q. You didn't look for him but you brought him back to the station house because of some other complaint and when you got there, what happened? A. Well, we called the complainant that we had on the stand before, Mrs. Goldman.

Q. How far away from the complainant's store did you find this boy? A. Well——

Q. Where he was trespassing? A. Do you mean from where Mrs. Goldman works until——

Q. Yes. From the place that you found him. How much of a distance is that there? A. Well, about four blocks.

Q. What was the time of day? A. Well, around 8:40 p.m.

Q. Now, that was last night? A. Yes.

THE COURT: Well, this boy seems to [47] inhabit the district despite all of your talk. He seems to be around there all the time. The next time as well as the night before. He is a person that is in that area. Did he have any shoe shine equipment with him?

THE WITNESS: He had his kit with him, yes.

Q. Did he have any money on him? A. Well, do you mean when I——

THE COURT: You have stipulated that there was some kind of other complaint. I take it it was a lawful arrest and that anything that was taken from him should be considered. It may be for the boy or against him. I don't know.

MRS. ROSENBERG: Well, except it may be prejudicial.

THE COURT: It should be prejudicial if he had money. If he didn't, it will be helpful. I'm going to ask the police officer over your objection.

THE WITNESS: Yes.

Q. Did he have any money or didn't he? A. At the time he did, yes.

Q. How much? A. He had $10 in his pocket, in dimes. Two rolls of [48] dimes.

Q. In dimes? A. Yes.

Q. He had no green money at all? A. No, no folding money. No green money.

Q. Did he have the money loosely in his pocket or in rolls? A. No, rolls.

Q. Do you have that with you? A. Yes.

Q. May I see it? A. Yes.

(Whereupon, the police officer is indicating to evidence that he has before the Court.)

THE WITNESS: There are four rolls here.

(Whereupon, the police officer is indicating again to the rolls of money that he has before the Court.)

THE COURT: Now, just to make life faster, can I ask this lady if any of her money was rolled in this fashion?

MRS. ROSENBERG: I'm going to stipulate that this money had come, Your Honor, from this [49] other petition. I'll stipulate that right now. Otherwise, you're going to think it came from Mrs. Goldman's pocketbook.

THE COURT: I take it this is not your money?

MRS. GOLDMAN: No.

THE COURT: Well, she admits it's not her money. The petitioner's money, it is not.

MRS. ROSENBERG: May I ask him some questions?

EXAMINATION BY MRS. ROSENBERG:

Q. Now, officer, where was this other place where this boy was found last night? A. Zaro's Bakery.

Q. What is the address? A. 384 East Fordham Road.

Q. Where is that? A. That is a half a block north of Webster Avenue at Fordham Road.

Q. Fordham Road, north of Webster? A. Yes.

Q. And Mrs. Goldman's store is on the Concourse and Fordham Road? [50] A. No, it's— it's on the Concourse and 188th Street.

Q. Which is how many blocks from Fordham Road? A. From Fordham Road?

Q. Yes. A. It would be one block north.

Q. This place or this other place, the bakery shop, is about six or seven blocks east of Mrs. Goldman's store? A. No, it's four blocks. That is all. In fact, it's not even four. It's three and a half.

THE COURT: You have been assigned to this area for sometime, haven't you?

THE WITNESS: Yes.

THE COURT: You know the area?

THE WITNESSS Yes.

THE COURT: So, is there anything else that we want to ask this gentleman?

MRS. ROSENBERG: No, sir.

THE COURT: All right. Thank you very much. You better take the money. It's not in evidence.

THE WITNESS: Yes.

MRS. ROSENBERG: The respondent moves to dismiss the petition for failure to establish [51] the allegation by a fair preponderance of the credible evidence.

THE COURT: Well, would you like mother to explain what her boy is doing 15 or 20 minutes by bus, away from home the next night, in the vicinity?

MRS. ROSENBERG: Well, we're concerned with the March 28th——

THE COURT: Well, your defense was that the boy had an alibi. He was not in the area. It seems to me that he was in the area.

MRS. ROSENBERG: The boy lives, Your Honor——

THE COURT: I mean, he lives in an improper sense—he seems to live in the area where the trouble occurred with Mrs. Goldman.

MRS. ROSENBERG: He may have been there one other time. The boy had said that he did not shine shoes in that store. I may add that Webster Avenue is somewhat of a dividing line of the Bronx and more so, it is an east and west type of a thing.

THE COURT: All we're talking about is an alibi that seems to be falling apart. The boy [52] seems to frequent this area.

MRS. ROSENBERG: The mother and uncle testified that on the night that Mrs. Goldman's bag was broken into——

THE COURT: Well, all right. Let's have the uncle back again? That is Mr. Coleman. I hope he hasn't left. He was talking about every night this week.

MRS. ROSENBERG: He testified that every night at 6:00 o'clock they had dinner.

THE COURT: Yes. Now, Mr. Coleman, you are still under oath. Would you give us another few minutes of your testimony, please?

THE WITNESS: Yes.

EXAMINATION BY THE COURT:

Q. Now, as I recall your testimony, sir, you say that this boy was in your sight at dinner time every night this week? A. Yes.

Q. Now, does that includes last night? A. No, not last night.

Q. What do you mean by every night this week, then? [53] A. Well, Monday, Tuesday and Wednesday. I mean, Monday and Tuesday.

Q. Well, Wednesday is last night. A. Right.

Q. You were not eating there last night? A. No.

Q. What kind of testimony were you giving before about every night this week? A. Well, I'm talking about Monday and Tuesday.

Q. How late did you keep eyes on this boy during dinner hour? A. Well——

Q. That is on Tuesday? Until when? A. About 7:00 o'clock.

Q. Last night, sir, you were not there at all? A. No.

Q. You told me that he asked you for money yesterday? What time of the day did he ask you for money? A. In the afternoon before I went out.

THE COURT: Strange.

MRS. ROSENBERG: It may be a perfect case of mistaken identity, Your Honor.

THE COURT: All right. Thank you, Mr. [54] Coleman. I cannot ask you any more.

(Whereupon, the witness was excused.)

MRS. ROSENBERG: This occurrence took place at 6:15 in the evening, Your Honor.

THE COURT: One witness' word against three. It's a question of who is telling the truth.

MRS. ROSENBERG: May I also bring out that during the petitioner's testimony, she said that she had been in the store during the supper hour and that she did not see this boy enter.

THE COURT: Well, it might— he might have been there from 4:00 o'clock on.

MRS. ROSENBERG: Well, if there were any customers in the store, the boy should be obvious. It should have been something that she should have seen and should have caught her attention.

THE COURT: Well, some boy was there. She didn't see any boy. I mean, you're not questioning Mrs. Goldman, saying that some boy was there. Some boy got in there without [55] her knowing about it and that there is no question about it. It comes down to a question of credibility. On the question of credibility, when you have an alibi situation the

boy, of course, is very much interested in getting off. So he is very much interested in testifying that he was some place else even though it may be a lie. The mother loves a boy and may look to tell fibs and an uncle, too. With regard to Mrs. Goldman, what reason does she have to tell any lies. I know of none. Why should she want to punish an innocent boy?

MRS. ROSENBERG: She may rightfully think that she has made a correct identification when, in fact, the identification is not true. If Your Honor will remember before——

THE COURT: Yes.

MRS. ROSENBERG: Before we do anything. We had a case last week here and there was an eye witness identification of a boy.

THE COURT: Yes.

MRS. ROSENBERG: Who swore that this was the boy who was in Warwick Training School.

[56] THE COURT: I remember. I'm very worried about these things.

MRS. ROSENBERG: We have——

THE COURT: Yes, I think this lady, Mrs. Goldman, knows the boy very well. She knows all about his shoe box shining. She knows all about his hat and this boy has stated that he has never been in the place before and never laid eyes on the lady. It is impossible that this woman would know this boy so well, and that boy absolutely lies and says that she does not know him at all. The boy can't be believed.

MRS. ROSENBERG: What about the question of the money not being found? $112 not being found.

THE COURT: It will be found once he produces it.

After both sides rest, the petition is found to be proved by a preponderance of the evidence. The testimony and description of the petitioner was very accurate and the demeanor of the petitioner impressed the Court and her previous knowledge of the boy did as well. [57] That is a finding. If I'm wrong, I'm wrong

MRS. ROSENBERG: Well, I would like to make one more motion.

THE COURT: What is that?

MRS. ROSENBERG: That this finding by Your Honor violates the boy's equal protection rights because if he was 16, he would have to be found guilty beyond a reasonable doubt.

Your Honor is making a finding by the preponderance of the evidence.

THE COURT: Well, it convinces me.

MRS. ROSENBERG: It's not beyond a reasonable doubt, Your Honor.

THE COURT: That is true. I'm convinced of the facts alleged. Our statute says a preponderance and a preponderance it is. That is the only difference between children and grownups that I can see. I don't think it's an unfair difference at all.

MRS. ROSENBERG: May I make some kind of statement on this for the record and perhaps for your reconsideration at this time?

THE COURT: Yes.

[58] MRS. ROSENBERG: Although the State may lawfully make distinctions between adults and children, the burden of proof and the quantum of the burden of proof has no relation to which the State is making between treatment of the children and adults. If this child was 16, it would be required to be proved against him beyond a reasonable doubt.

THE COURT: Well, I think it's a reasonable distinction in that the State keeps this record a secret. It does not go onto his record. If he were over 16, he would be subject to increasing penalties as and if his crimes multiply or in cases of children and I may go on for a long time with all the arguments made about the protection of children, but I daresay that if the State of New York wanted to, they can reduce all the quantum of truth to a preponderance and I don't think——

MRS. ROSENBERG: That may well be but it's a distinction.

THE COURT: I don't think that there is unequal effect upon this boy since he's not subject to adult imprisonment, adult records, adult punishments. That there is more rehabilitation here and more secrecy here to protect him.

MRS. ROSENBERG: That may well be, but it has nothing to do with the burden of proof imposed by the State. The distinction is between adults and the children may be valid themselves but this particular distinction of beyond a reasonable doubt and a preponderance of the evidence have nothing to do with the State's distinction of treatment of these children as opposed to adults.

THE COURT: Well, this State can make distinctions and unequal laws depending upon reasonable differences.

MRS. ROSENBERG: Is there a valid distinction?

THE COURT: Yes. In this sense there is. Another factor here for the preponderance rule is that anybody who really wants to know knows that I can more easily make a mistake on preponderance than beyond a reasonable doubt basis [60] and my finding isn't that certain.

MRS. ROSENBERG: No finding is certain.

THE COURT: No, not certain as a finding of an adult court because the rule is different. Somebody may not take my finding to be a solid basis as an adult finding because it's not made on the same basis, but then there are hundreds of ordinary Civil Court Judgments for money and sometimes for huge amounts made on the preponderance of the evidence by juries and judges alike and injunctions are made and divorces are given. Adultery is found on the basis of preponderance. This boy's life won't be hurt by my finding. The question is if it's true.

MRS. ROSENBERG: He may be hurt.

THE COURT: Yes.

MRS. ROSENBERG: He's subject to training school for this finding.

THE COURT: Well, it would have to be a lot more than this finding before he ever gets taken away from his mother. Let's have the probation report. I must say or get on that your argument is very, very well put, but it does not prevail [61] today.

PROBATION OFFICER: Would you hear the other case because we have the petition on the boy?

THE COURT: All right. Let me ask you, Mrs. Rosenberg, do you want' another Judge to hear the second petition?

MRS. ROSENBERG: I want an adjournment.

THE COURT: I already know this boy has done something wrong.

MRS. ROSENBERG: I know that.

THE COURT: All right.

MRS. ROSENBERG: Well, I'm sure that Your Honor wouldn't be influenced by it, but——

THE COURT: But you are?

MRS. ROSENBERG: Yes.

THE COURT: All right. Do you want an adjournment?

MRS. ROSENBERG: Yes.

THE COURT: What do we do with the boy until the adjournment?

PROBATION OFFICER: Remand. He's a parolee from the training school.

[62] MRS. ROSENBERG: He's not a parolee. His time is up. It has expired.

PROBATION OFFICER: Well, there was an extension going back.

MRS. ROSENBERG: When was there an extension?

PROBATION OFFICER: Active with Mrs. Schwartz. Paroled. The extension was on 1/12/67 for one year as of 2/28/67.

THE COURT: I see.

MRS. ROSENBERG: Well, I dont' have the record here.

THE COURT: All right.

MRS. ROSENBERG: The boy has been home. How long has he been at home with you?

MRS. WINSHIP: Since December.

THE COURT: When was this other offense supposed to have occurred, last night? The one that I have before me is the night before. He makes one theft a night, mother, as far as I can tell.

MRS. WINSHIP: Samuel was home on Tuesday. I'm telling you the straight truth. I don't [63] have to lie for him. Samuel was at home on Tuesday. He was with me.

THE COURT: What was he doing— I'm not hearing that case now, Mrs. Winship. I'm hearing the case of whether I can send him home. What was he doing with four rolls of dimes in his pocket last night?

MRS. WINSHIP: I don't have any idea. I don't know. I got a call from the patrolman. He came to the house.

THE COURT: On the question of whether he's going to commit another crime and am I supposed to send him home with dimes all over him.

MRS. ROSENBERG: May I speak and as long as you're not going to hear the case. There's going to be a hearing on it. The boy said that he did not enter the premises of the bakery shop with the intent to commit a crime therein. He often went into this store to give shoe shines to the owner. When he went in, he saw the money lying on an open safe. He took the dimes to give to the clerk of the store and to tell the clerk that the money wasn't safe there. He did not run. The woman had gotten excited.

THE COURT: When do you want the case heard?

MRS. ROSENBERG: Sometime when you leave.

THE COURT: What is he doing so far from home?

MRS. WINSHIP: He went out shoe shining yesterday. He asked for permission to go. I feel it's better not to hold him at home and to make the extra change for himself.

THE COURT: How did he get so far from home shoe shining?

MRS. WINSHIP: Well, in my neighborhood it's— there's nothing really around.

THE COURT: You can't shine shoes?

MRS. WINSHIP: No, not in that section.

THE COURT: All right. Well, let's see. What else has this boy got on his record? What did he get sent to the training school for?

PROBATION OFFICER: Fire setting and a second one for burglary.

THE COURT: I see.

PROBATION OFFICER: While he was——

[65] THE COURT: Well, this little one?

PROBATION OFFICER: Yes. When he was ten. He was very young. That was in 1963, I believe. He was about nine or ten.

MRS. ROSENBERG: That was a P.I.N.S. the first one or what was it?

THE COURT: When is the case going to be heard?

MRS. ROSENBERG: Well, sometime in April.

THE COURT: April?

MRS. ROSENBERG: Yes.

THE COURT: Why April?

MRS. ROSENBERG: I have to get a witness.

THE COURT: All right.

PROBATION OFFICER: Next week.

MRS. ROSENBERG: Next week.

COURT OFFICER: You'll be in Part II next week, Your Honor.

THE COURT: All right. I won't be here. Good. April what? When will your witness be available? That is the first date.

MRS. ROSENBERG: I don't know, sir. I have to serve a subpoena, sir.

[66] THE COURT: All right. Make it April the 6th.

MRS. ROSENBERG: The 10th.

THE COURT: No. Make it April the 6th. This boy is a dangerous person.

MRS. ROSENBERG: All right. April the 6th.

THE COURT: All right. I'll say paroled over objection of probation officer.

PROBATION OFFICER: He has also been known to intake three or four times for various things that were adjusted.

THE COURT: Well, I can't keep him for more than three or four days for another hearing.

PROBATION OFFICER: Can she produce her witness in three or four days?

MRS. ROSENBERG: I don't know.

THE COURT: Mother, will you promise me to keep him home at night?

MRS. WINSHIP: Yes.

THE COURT: And no more letting him out at all?

MRS. WINSHIP: Well, he won't be out of my sight for a second.

[67] THE COURT: All right. You are not working?

MRS. WINSHIP: No.

PROBATION OFFICER: Excuse me. You made a finding. You can hold him as long as you want to.

THE COURT: I can on a finding, for ten days.

PROBATION OFFICER: That is plenty of time. I don't think the boy should go home.

THE COURT: Why do you want him at home? He's very difficult and somebody is going to hurt him one of these days.

MRS. WINSHIP: He's not difficult at home. Samuel is not difficult at home. I have no problem with him.

THE COURT: You are not working now?

MRS. WINSHIP: No. He goes to school every day.

THE COURT: How long does it take him to get home after school?

MRS. WINSHIP: About ten or fifteen minutes.

THE COURT: He comes home directly to you, mother?

MRS. WINSHIP: He brings home his sister.

[68] THE COURT: Well, if you tell me on your word of honor that you will keep him, except for school time, I'll let him go until the 6th.

MRS. WINSHIP: I'll give you my word of honor for that.

THE COURT: All right. Paroled to mother on condition to personally supervise and personally observe him and super-

vise him in the home except for school time. That is all. All right. He must be in school. He's not a truant, is he?

MRS. WINSHIP: No, he's not.

THE COURT: All right.

MRS. WINSHIP: You can check his school if you would like. He goes to P.S. 6.

THE COURT: All right. No more shoe shining.

MRS. WINSHIP: Definitely not.

THE COURT: That is all. That is adjourned to April the 6th, 1967. That is all. Peremptorily against both sides. I think you should go to trial on the 6th. You don't have to go to trial on that other one. If you are not ready, this matter is going to be disposed of. I think it should be disposed of before Judge DiCarlo. I won't dispose of it. You can bring it to me if you want to, but it's important to know a few more things and it's marked peremtorily. If they're ready for trial and you're not and is the police officer still here?

POLICE OFFICER: Yes.

THE COURT: Are you the one who arrested him?

POLICE OFFICER: Yes.

THE COURT: You better leave a very important note for Lieutenant Sloan to be sure to be ready to try this case on the 6th.

COURT OFFICER: Here's the other petitioner.

THE COURT: Can you come back on the 6th, madam?

PETITIONER: Yes.

THE COURT: All right. The boy needs a witness and this police officer will be back and that is the last time that we'll bother you.

PETITIONER: Thank you.

THE COURT: Paroled on the respondent's request for a witness. That is all. That is [70] marked peremptorily to 4/6/67. That is all.

(Whereupon, the above matter was hereby adjourned to April 6, 1967, to be heard in Part I, Bronx County Juvenile Term.)

REPORTER'S CERTIFICATE
(omitted in printing)

Secs. 742, 744 F.C.A. Form 7-12 (Delinquency Supervision)

FAMILY COURT OF THE STATE OF NEW YORK

CITY OF NEW YORK

COUNTY OF BRONX

Docket No. D-797/67

In the Matter of

SAMUEL WINSHIP

A Person Alleged to be a Juvenile Delinquent, *Respondent*

Determination Upon Fact Finding Hearing
(Juvenile Delinquent)

The petition of Rae Goldman under Article 7 of the Family Court Act, sworn to on March 30th, 1967, having been filed in this Court, alleging that the above-named Respondent is a juvenile delinquent; and

The said Respondent [and Ethel (Coleman) Winship the (parent of said Respondent) having (appeared) before this Court to answer said petition and the allegations of the petition having been (denied) and respondent being represented by a Law Guardian; and

The matter having duly come on for an adjudicatory hearing before this Court;

Now, after hearing the proofs and testimony offered in relation to the case, the Court determines that the following fact have been established by a preponderance of the evidence:

1. That the Respondent on or about March 28th, 1967 at 2436 Grand Concourse, Bronx did an act which, if done by an adult would constitute the crime of Larceny, in that the Respondent at said time and place did act as alleged in the petition; and

2. That the Respondent was a person under sixteen years of age at the time of the aforesaid act.

3. Paroled to Mother to 4/6/67.

4. ———

Dated: March 30th, 1967

MILLARD L. MIDONICK.
J.F.C.

This is to certify that this is a true copy of Fact Finding Hearing made in the matter designated in such copy and shown by the records of the Family Court of the State of New York, within the City of New York, for the County of Bronx.

RACHEL [Illegible]
(Seal) *Clerk of Court*

Date Dec 8 1967

Docket Entries

Dates	Orders and Adjournments
Mar 30 1967	P — R — Mother — LG
Finding	After both sides rest, this petition is found to be proved by a preponderance of the evidence. The testimony & description of P was very accurate, and the demeanor of P impressed the Court, & his previous knowledge of the R did as well. I am convinced of the facts alleged. Paroled over objections of P. O. to mother on condition she personally observe him & supervise him in the home except for school time, when he must be in school. No more school skipping permitted. 4/6/67 Peremptorily against both sides for trial of D798-67. If it cannot be tried, disposition ought to be concluded if feasible hereunder. MKy
Apr 6 1967	Adj. to April 13, 1967 JD
Apr 13 1967	Placement at State Traning School—discharged to File No. 798/1969

This is to certify that this is a true copy of Endorsements made in the matter designated in such copy and shown by the records of the Family Court of the State of New York, within the City of New York, for the County of Bronx.

RACHEL [Illegible]
(Seal) *Clerk of Court*

Date Dec 8 1967

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 6th day of June, 1968

Present—Hon. Bernard Botein, Presiding Justice
" Samuel W. Eager,
" Louis J. Capozzoli,
" Owen McGivern,
" Benjamin J. Rabin,
Justices

In the Matter of

SAMUEL W.,

A Person Alleged to be a Juvenile Delinquent, *Appellant.*

Affirmance of Order

13051

An appeal having been taken to this Court by the appellant an order of the Family Court Bronx County, entered on April 13, 1967 adjudging him a juvenile delinquent, and said appeal having been argued by Rena K. Uviller, of counsel for the appellant, and by Mr. Raymond S. Hack, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed.

ENTER:

HYMAN W. GAMSO
Clerk.

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 6th day of March in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk*

Remittitur March 6, 1969.

1. No. 616. 68

In the Matter of

SAMUEL W., *Appellant,*
THE FAMILY COURT OF THE STATE OF NEW YORK, *Respondent.*

BE IT REMEMBERED, That on the 6th day of December in the year of our Lord one thousand nine hundred and sixty-eight, Samuel W., the appellant—in this cause, came here unto the Court of Appeals, by Anthony F. Marra and Rena K. Uviller, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The Family Court of the State of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Rena K. Uviller, of counsel for the appellant—, and by Mr. Raymond S. Hack, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Family Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Family Court of the State of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Family Court, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 6, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein,

RAYMOND J. CANNON
(Seal) *Clerk.*

In the Matter of SAMUEL W., Appellant; FAMILY COURT OF THE STATE OF NEW YORK, Respondent.

Argued December 9, 1968; decided March 6, 1969.

Infants—juvenile delinquency—sufficiency of proof—section 744 (subd. [b]) of Family Court Act, which provides that determination, after hearing, that child did act "must be based on a preponderance of the evidence", is not unconstitutional—not necessary that proof be beyond reasonable doubt—no deprivation of due process—no substantial equal protection question.

1. Section 744 (subd. [b]) of the Family Court Act, which provides that any determination at the conclusion of an

adjudicatory hearing that the child did an act "must be based on a preponderance of the evidence", is not unconstitutional. In the procedure governing juvenile delinquency it is not necessary that the proof be beyond a reasonable doubt.

2. The finding by the Family Court, by a fair preponderance of the evidence, that the allegation against the 12-year-old child to the effect that he had removed $112 from a persons' pocketbook and stolen it was true was a constitutionally sufficient finding. There is no deprivation of due process in the statutory provision.

3. Since the proceeding is different from a criminal prosecution, there is no substantial equal protection question in the case. It is not an absence of procedural due process that a noncriminal status determination have a different measure of proof than that required for conviction of crime.

Matter of Samuel W., 30 A D 2d 781, affirmed.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 6, 1968, which unanimously affirmed an order of the Family Court (JOSEPH C. DI CARLO, J.), entered in Bronx County, adjudging appellant to be a juvenile delinquent.

Rena K. Uviller and *Charles Schinitsky* for appellant. Section 744 of the Family Court Act which permits a finding of delinquency upon a preponderance of the evidence rather than proof beyond a reasonable doubt is unconstitutional. (*Matter of Gault*, 387 U. S. 1; *Matter of Gregory W.*, 19 N Y 2d 55; *United States* v. *Costanzo*, 395 F. 2d 441; *Leland* v. *Oregon*, 343 U. S. 790; *Woodby* v. *Immigration Serv.*, 385 U. S. 276; *Tehan* v. *Shott*, 382 U. S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719; *Stovall* v. *Denno*, 388 U.S. 293; *People* v. *Ballott*, 20 N Y 2d 600; *Holland* v. *United States*, 348 U. S. 121.)

J. Lee Rankin, Corporation Counsel (*Raymond S. Hack* and *Stanley Buchsbaum* of counsel), for respondent. Due process of law and the equal protection of the law do not require that the acts alleged in a juvenile delinquency petition be proved beyond a reasonable doubt. Subdivision (b) of section 744 of the Family Court Act, which requires that the finding of facts be based upon a preponderance of the evi-

dence, is constitutional. (*People* v. *Lewis*, 260 N. Y. 171; *Matter of Gault*, 387 U. S. 1; *Matter of Gregory W.*, 19 N Y 2d 55; *United States* v. *Costanzo*, 395 F. 2d 441; *Kent* v. *United States*, 383 U. S. 541; *Thompson* v. *Louisville*, 362 U. S. 199; *Jacobellis* v. *Ohio*, 378 U. S. 184; *Haynes* v. *Washington*, 373 U. S. 503; *Lyons* v. *Oklahoma*, 322 U. S. 596; *Woodby* v. *Immigration Serv.*, 385 U. S. 276.)

BERGAN, *J.* A main objective of the special system of law for treating young juvenile offenders is to hold them as children apart from the usual methods and ineradicable consequences of the criminal law. This court in *People* v. *Lewis* (260 N. Y. 171) expressed, in 1932, the hope and the purpose of the framers of the early New York juvenile delinquency statutes, beginning with the Children's Court Act in 1922, that the proceedings were not designed to be punitive but were for the protection and training of a child found in difficulty; and would be administered by humane and parentally minded Judges whose end was not to punish, but to save the child.

The successful juvenile court is concerned primarily with the totality of factors which cause a child to meet difficulty in his life, and only incidentally with the event which brings the child to the court, which may itself play only a small role in that problem.

The Judge, acting as a mature and well-balanced parent, tries to find the answer to the childs' trouble; and only if all else fails and there is no other recourse, does he commit the child to any institution, and even then he tries to find the one best suited to the child's needs and having the fewest punitive policies.

Nothing could be farther removed in temper and purpose than this from the criminal court for adults. And although it has failed, as all human institutions have a tendency to do, always to reach its highest purpose; and has sometimes in method and result seemed to act like a criminal court, it is not reasonably arguable that in the half-century or so of its existence in the United States the juvenile court has profoundly changed for the better the way children in difficulty are treated by the public legal system.

In such a court, the accoutrements of due process evolved from the 18th Century experience with the rigors of commonlaw prosecutions—public trial, shields against self in-

crimination, adversary inquiry into the single event which brought the child to court—seem irrelevant.

As Judge CROUCH wrote for the majority in *Lewis* (p. 177): "For the purposes of this case, the fundamental point is that the proceeding was not a criminal one. The State was not seeking to punish a malefactor. It was seeking to salvage a boy who was in danger of becoming one. In words which have been often quoted, 'the problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' (23 Harvard Law Review, 104, 119, 'The Juvenile Court,' by Julian W. Mack.)*** Since the proceeding was not a criminal one, there was neither right to nor necessity for the procedural safeguards prescribed by constitution and statute in criminal cases."

In that case an important constitutional question was squarely met. The Trial Judge examined the 15-year-old boy as to the facts of alleged delinquency in a private hearing, but in the presence of his family and clergyman, without warning against self incrimination (pp. 173–174). The boy admitted the facts and on his admission the adjudication of juvenile delinquency was made. It was not, Judge CROUCH noted, in examining the constitutional problem, a "criminal trial and there was no defect" (p. 174).

Apart from how the Constitution may be read in its effect on highly informal proceedings looking into the circumstances in which a child is failing in normal growth and in adaptation, there is a genuine and responsibly held difference of opinion about what is best to do. Many sociologists believe that the criteria of the criminal law and its methodology, including protection against self incrimination and the right to counsel in the case of the young child, impair rather than help a process designed not as punishment but as salvation.

A lawyer's tradtional professional duty in an adversary proceeding is to do what he can and fight as hard as he can, to see his client wins. In the criminal case this is to see his client acquitted, the charge reduced, or the punishment minimized. But a child's best interest is not necessarily, or even probably, promoted if he wins in the particular inquiry which may bring him to the juvenile court.

And since the lawyer as advocate ought not be stultified in his professional obligation to sustain his cause, he should likewise not be cast in the role of impartial adviser to the court on the social problem involved; and, thus, the original view of the founders of the juvenile court that it would be better not to have formal adversary proceedings remains essentially valid.

Self incrimination in the historic Star Chamber sense in which the Bill of Rights was concerned is thought by proponents of the juvenile court to have no relevancy to a process in which the particular act which brought the child to the inquiry may play no significant part in an attempt to see him in his total environment and to help him. In theory, at least, there is nothing to incriminate and there is no criminal.

There is, naturally enough, another side of the coin. A different view is shared by a number of lawyers concerned. They see some danger of erosion of constitutional rights in the informality and lack of "legality" in the way juvenile court Judges in practice deal with the children's cases. And they are concerned, also, that "fairness" by the customary standards of the adult criminal case is being withheld from children in juvenile courts.

It is pointed out that the event that brings the child before the Judge is, by definition, the equivalent of a crime, i.e., an "act which, if done by an adult, would constitute a crime" (Family Ct. Act, § 712, subd. [a]). It is noted, additionally, that the disposition of the case, although not penal in nature, may sometimes be not much different from that of youthful offenders convicted under the criminal laws. Under very limited circumstances, for example, the juvenile may be committed to Elmira Reception Center or other similar institutions (Family Ct. Act, § 758, subd. [b]).

Careful and fully explicit safeguards, however, are provided in the statute to insure that an adjudication of this kind is not a "conviction" (§ 781); that it affects no right or privilege, including the right to hold public office or to obtain a license (§ 782); and a cloak of protective confidentiality is thrown around all the proceedings (§§ 783–784). These protections have had full judicial implementation (*Matter of Giroffi*, 283 App. Div. 890; *Murphy* v. *City of New York*, 273 App. Div. 492; *Matter of Hambel* [*Levine*], 243 App. Div. 530; *Hill* v. *Erie R. R. Co.*, 225 App. Div. 19).

Although this plenary protection to good name and status is very different from the residual disabilities flowing from criminal conviction, the argument in favor of criminal court protective rights for delinquent children continues to stress the possible loss of freedom as one consequence of the proceeding.

The juvenile court system, on the basis of that argument, has had the singular misfortune of being impaled on the sharp points of a few hard constitutional cases (e.g., *Matter of Gault,* 387 U. S. 1; *Kent* v. *United States,* 383 U. S. 541; *Matter of Gregory W.,* 19 N Y 2d 55). This possibility and, in the particular instances, the actuality, were the bases of reasoning by which the court in cases such as *Gault* and *Gregory W.* applied criminal law protective techniques to the juvenile proceedings.

They were not only hard cases; each had facts easily dramatized. They were not typical of the vast mass of juvenile proceedings in the United States. In *Gault* there was an absence of elemental fairness. The complainant was not sworn and did not appear in court; there was no adequate notice of the proceedings given to the parents; there was no counsel or offer of counsel; no record was made of proceedings; there was no right of appeal or review; and the juvenile court Judge, explaining his action, seemed to have a somewhat vague notion of the alternatives open to him (387 U. S. 1, 28–29). The court, accordingly, was able to reach the encompassing conclusion (p. 29): "The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case."

The facts in *Matter of Gregory W.* (*supra*) were almost equally dramatic. One 12-year-old child, mentally disturbed, was detained by police and questioned for 24 hours; the other 12-year-old child for 10 hours. This period was regarded as unreasonable and their admissions held to have been coerced. And *Kent* v. *United States* (383 U. S. 541, *supra*), the precursor of *Gault,* was also a hard case. There, the Juvenile Court of the District of Columbia waived jurisdiction of that court and transferred petitioner to the District Court for criminal proceedings against him with a resulting heavy penal sentence without giving him an adversary right to oppose the waiver. This decision was held arbitrary.

It can scarcely be doubted that *Gault* and *Kent* have had an adverse effect on the concept of a juvenile court free from

the technicalities of the criminal law. (See, e.g., the comment of the Supreme Court of Illinois on *Gault* that the "opinion exhibits a spirit that transcends the specific issues there involved" [*In re Urbasek*, 38 Ill. 2d 535, 541].)

Historically, as it has been seen, a majority of this court gave ungrudging support to the concept of a system of dealing with children's cases free from criminal law technicalities in *People* v. *Lewis* (260 N. Y. 171, *supra*). It is interesting to note that the present constitutional issue was joined in that case almost 40 years ago in the strong dissent of Judge CRANE, with whom Judge KELLOGG concurred, in which substantially all of the objections that have since developed were examined, especially the protection against self incrimination. (See 260 N.Y., pp. 179-185.)

But, of course, the decisions of the majority in *Lewis* could no longer survive the constitutional views which now are dominant; and, indeed, the Legislature has given extensive statutory implementation to procedures which in many respects run the juvenile procedure in close parallel to the adult criminal courts. (See, e.g., Family Ct. Act, art. 7: Part 2, Custody and Detention, §§ 721, 724, 726, 729; Part 3, Preliminary Procedure, §§ 731, 736, 738; Part 4, Hearings, §§ 741, 744, 745, 746, 748; Part 5, Orders, §§ 752, 758; Part 6, New Hearing and Reconsideration of Orders, § 761.)

Whether these techniques really help the child, whose interest it is the declared purpose of the State to protect, remains a debated question, unresolved between the advocates of two quite different methods and two different philosophies. It seems probable we cannot have the best of two worlds. If the emphasis is on constitutional rights something of the essential freedom of method and choiec which the sound juvenile court Judge ought to have is lost; if range be given to that freedom, rights which the law gives to criminal offenders will not be respected. But the danger is that we may lose the child and his potential for good while giving him his constitutional rights.

Some such discussion as that which has been undertaken seems useful to put the present case in perspective. It involves the constitutionality of section 744 (subd. [b]) of the Family Court Act, which is one of the provisions governing the procedure in juvenile delinquency. The section provides that any determination at the conclusion of an adjudicatory hearing that the child did an act "must be based on a pre-

ponderance of the evidence." In a criminal case the standard of proof is beyond a reasonable doubt; that is, if there be a "reasonable doubt" he is "entitled to an acquittal" (Code Crim. Pro., § 389).

The Family Court in the present case made a specific finding by a fair preponderance of the evidence that the fact alleged against the 12-year-old appellant, to the effect he had removed $112 from petitioner's pocketbook and stolen it, was true. The law guardian contemporaneously raised the question of the constitutional sufficiency of the finding. The sufficiency of the finding is the only question on this appeal.

It is not easy to define for the purposes of practical application the tenuous difference between "beyond a reasonable doubt" as a quantitative or qualitative test of proof, and "by a fair preponderanec of the evidence." It is enough to say that for a very long time one has been used in the criminal law and the other in civil law, and that the profession accepts the view that beyond a reasonable doubt is a "higher" standard.

But the standard is in the present case expressly stated by statute; and, indeed, by a statute which goes very far in providing due process safeguards for children in delinquency proceedings in Family Court. The delinquency status is not made a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process in the statutory provision; and, since the proceeding is quite different from a criminal prosecution, it seems reasonable to think there is no substantial equal protection question in the case.

The decision in *Gault,* in which there was almost a total absence of due process, is not necessarily to be read as an interdiction of this standard of proof required by the New York statute. It is not an absence of procedural due process that a noncriminal status determination have a different measure of proof than that required for conviction of crime. This was the holding of the District of Columbia of Appeals after a reading of *Gault in Matter of Wylie* (231 A. 2d 81). A contrary conclusion was reached in Illinois in *In re Urbasek* (38 Ill. 2d 535, *supra*). The question was not decisive in *United States* v. *Costanzo* (395 F. 2d 441), where the judgment of adjudication was affirmed, and the Trial Judge had applied what the court regarded as a proper standard of proof.

The order should be affirmed, with costs.

Chief Judge FULD (dissenting). There is much in the court's opinion with which I agree but on the narrow question presented—the standard of proof to be applied in proceedings against juvenile delinquents—it seems to me that the answer has been virtually foreclosed by the Supreme Court. In my view, the decision in *Matter of Gault* (387 U. S. 1) requires the conclusion that due process of law is violated if a child may be found to have committed a crime and incarcerated for an appreciable length of time on evidence less than proof beyond a reasonable doubt.

I do not believe that a lesser standard may be justified on the theory that the proceedings—which may result in confinement of a 12-year-old boy in a State Training School for as long as six years—are designed, in the words of the court (opn., p. 197), "not to punish, but to save the child." This rationale, it seems to me, was decisively rejected by the court's approach to the problem in *Gault*. "Ultimately," the court there wrote (387 U. S., at p. 27), "we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours. . . .' [*Holmes' Appeal*, 379 Pa. 599, 616, MUSMANNO, J., dissenting.] Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide."

Once the Supreme Court decided that the child was entitled, as a matter of due process, to notice of charges, to counsel, to the rights of confrontation and examination and the privilege against self incrimination—because the proceeding is "comparable in seriousness to a felony prosecution" (387 U. S., at p. 36) and because the "safeguards available to adults" in "a normal criminal case *** [may not be] discarded in [a child's] case" (p. 29)—it necessarily follows

that a finding of guilt, which entitles a court to confine a boy until his eighteenth year, may not be predicated upon less than proof beyond a reasonable doubt.

There may not be any decision expressly stating that the reasonable doubt standard is an essential aspect of due process in criminal prosecutions. But who could question that it is? That standard has been so deeply imbedded in our law, is so fundamental and universal, that no one would venture in an ordinary criminal case to apply a standard less stringent. It is essential to due process not only because of the deprivation of liberty which could result but also because of the vital part it plays in the entire criminal procedural scheme. For example, the burden of proof is closely related to the privilege against self incrimination—as a device to offset the adverse effect of a defendants' failure to defend himself. It also compensates for lack of discovery proceedings and disclosure devices traditionally available to ordinary civil litigants. Manifestly, a person accused of a crime, whether he be an adult defendant in a criminal case, or a child charged as a delinquent, would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

My conclusion is not without support in judicial decision. At least two courts have also concluded that, in the light of *Gault* (387 U. S. 1, *supra*), due process demands that the proof in a delinquency proceeding be beyond a reasonable doubt. (See *In re Urbasek,* 38 Ill. 2d 535; *United States* v. *Costanzo,* 395 F. 2d 441; see, also, Dorsen and Rezneck, Gault and Juvenile Law, 1 ABA Family Law Quart., No. 4 [Dec., 1967] pp. 1, 25–27. But see, contra, *In re Wylie,* 231 A. 2d 81; *De Backer* v. *Brainard,* 183 Neb. 461, probable jurisdiction noted Feb. 24, 1969, — U. S. —, 37 U. S. Law Week 3301.) Thus, in the *Costanzo* case (395 F. 2d 441, *supra*), the Federal Court of Appeals for the Fourth Circuit declared (pp. 444–445):

> "Our precise question then is whether for purposes of the required quantum of evidence, no less than for notice, counsel, cross-examination, and the privilege against self-incrimination, a federal juvenile proceeding which may lead to institutional

> commitment must be regarded as 'criminal.' We hold that it must be so regarded. No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. [Case cited.] The Government's burden in a juvenile case, therefore, is to prove all elements of the offense 'beyond a reasonable doubt,' just as in a prosecution against an adult.*** In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection.***
>
> "It would appear a patent violation of due process and equal protection of the law if a juvenile were found to have committed a crime on less evidence than would be required in the case of an adult, especially since the consequences of the adjudications are essentially the same."

And in the *Urbasek* case (38 Ill. 2d 535, *supra*), the high court of Illinois, noting that the language of the opinion in *Gault* "exhibits a spirit that transcends the specific issues there involved" (p. 541), wrote that (pp. 540–541)

> "*** it would seem that the reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that *a finding of delinquency for misconduct, which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged.* [p. 540]
>
> "*** When we eschew legal fictions and adopt a realistic view of the consequences that attach to a determination of delinquency and a commitment to a juvenile detention home, 'juvenile quarters' in a jail or a State institution *** we can neither truthfully nor fairly say that such an institution is devoid of penal characteristics.*** the incarcerated juveniles' liberty of action is restrained just as effectively as that of the adult inmates serving terms in State and Federal prisons. [p. 541] " (Emphasis supplied.)

It may well be, as the court observes (opn., p. 202), that there is but a "tenuous difference" between "a fair preponderance of the evidence" and "proof beyond a reasonable doubt." But the simple fact is that the Family Court Judge in the case before us saw a difference between those standards. In reaching his decision that the appellant was guilty, he explicitly acknowledged that he was basing his findings of fact on the "preponderance of evidence" and frankly admitted that the proof fell short of establishing guilt or delinquency beyond a reasonable doubt. Along with Dorsen and Rezneck (Gault and Juvenile Law, 1 ABA Family Law Quart., No. 4 [Dec., 1967], 1, p. 27, *supra*), I too find it difficult to understand "how the distinctive objectives of the juvenile court give rise to a legitimate institutional interest in finding a juvenile to have committed a violation of criminal law on less evidence than if he were an adult."

It has been aptly said that the prosecution's duty to establish guilt beyond a reasonable doubt "is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" (*Leland* v. *Oregon*, 343 U.S. 790, 802–803, per FRANKFURTER, J., dissenting.) With the *Gault* case on the books, it follows, I suggest, that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process, as well as of equal protection, the case against him must be proved beyond a reasonable doubt.

The order appealed from should be reversed.

Judges SCILEPPI, BREITEL and JASEN concur with Judge BERGAN; Chief Judge FULD dissents and votes to reverse in a separate opinion in which Judges BURKE and KEATING concur.

Order affirmed.

THE COURT OF APPEALS
STATE OF NEW YORK

In the Matter of

SAMUEL W., *Appellant,*

THE FAMILY COURT OF THE STATE OF NEW YORK, *Respondent.*

Notice of Appeal to the Supreme Court of the United States

I

Notice is hereby given that Samuel W., the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York entered on March 6, 1969, affirming an order of the Appellate Division of the New York Supreme Court, First Judicial Department, entered on June 6, 1968, which in turn affirmed an order of the Family Court, Bronx County, rendered on April 13, 1967, adjudicating appellant to be a juvenile delinquent.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellant was adjudicated a delinquent on the basis of a finding that he committed an act which if committed by an adult, would constitute the crime of larceny under the New York Penal Law. On April 13, 1967, he was placed in the New York State Training School for an initial period of eighteen months. Placement was extended for one year as of October 13, 1968, pursuant to § 756 of the Family Court Act which permits such yearly extensions, in the discretion of the Family Court judge, until appellant's eighteenth birthday.

II

The Clerk of the Court will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) Petition of Delinquency, including all endorsements thereon;

(2) Determination of fact-finding entered in the Family Court on March 30, 1967;

(3) Minutes of the Family Court fact-finding hearing of March 30, 1967;

(4) Order of Appellate Division, First Department, entered June 6, 1968;

(5) Order of the Court of Appeals affirming the Order of the Appellate Division;

(6) Opinion of the Court of Appeals;

(7) Notice of Appeal to the Supreme Court of the United States.

The following question is presented by this appeal:

Whether Section 744 of the New York Family Court Act, Both on Its Face and as Applied in This Case, Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment in That It Provides for an Adjudication of Juvenile Delinquency and Confinement in a State Training School Until a Juvenile's Eighteenth Birthday Upon a Mere Preponderance of the Evidence.

Yours, etc.,

Dated: New York, N. Y.
March 27, 1969

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To: HON. RAYMOND J. CANNON, Clerk
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Bronx, New York

AFFIDAVIT OF SERVICE
(omitted in printing)

SUPREME COURT OF THE UNITED STATES

No. 85 Misc., October Term, 1969

In the Matter of
SAMUEL WINSHIP, *Appellant.*

UPON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

October 27, 1969

SUPREME COURT OF THE UNITED STATES

No. 85 Misc., October Term, 1969

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APPEAL from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellante docket as No. 778 and placed on the summary calendar.

October 27, 1969

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